APPEAL NO. 172725
FILED JANUARY 3, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 10, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on November 18, 2016, with an impairment rating (IR) of 9%.

The claimant appealed the ALJ's determinations as being contrary to the evidence and argued that the "preponderance of the medical evidence supports a finding that the certification should be 18% with MMI 5-9-17 per [(Dr. B), the required medical examination (RME) doctor], and the [ALJ] erred in not adopting this certification." We note that there is no Report of Medical Evaluation (DWC-69) in evidence which certifies MMI on May 9, 2017.

The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

It is not disputed that the claimant sustained a compensable injury on (date of injury), when his right hand was crushed between a tractor-trailer and a loading dock. The parties stipulated, in part, that the compensable injury extends to a crush injury of the right hand, a displaced fracture of the distal phalanx of the right thumb, and right index and right long finger flexor muscle lacerations and mechanical complication of muscle and tendon graft and that (Dr. M) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), in part, to address MMI/IR.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the

preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides, in part, that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In evidence is a DWC-69 from the first designated doctor, (Dr. C), who examined the claimant on January 12, 2017. Dr. C opined that the claimant had not reached MMI based on his opinion that the claimant would benefit from further hand therapy visits. However, the evidence reflects that the therapist recommended that the claimant be discharged from occupational therapy on November 28, 2016, due to a lack of progress.

Dr. M examined the claimant on August 7, 2017, and certified that the claimant reached MMI on November 28, 2016, with a 4% IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). The ALJ states in her decision that "In reviewing the relevant portion of the AMA Guides, [Dr. M's] certification cannot be adopted as a Grade 1 would equate to a 0% sensory deficit." Furthermore, she wrote "it was unclear whether [Dr. M] rated the entire compensable injury." We agree. Dr. M's narrative report dated August 7, 2017, indicated range of motion (ROM) testing yielded invalid results and was not used to determine IR. Dr. M indicated he therefore used the AMA Guides to assign impairment based upon sensory deficits of the right index finger and thumb; however, instead of rating sensory loss of the affected digits, Dr. M employed Chapter 3.1k and Table 11a on page 3/48 of the AMA Guides to rate a peripheral nerve disorder. Further, Dr. M describes the claimant's sensory deficit as a Grade 1 classification which, under Table 11a, yields a 0% sensory deficit. Finally, Dr. M provided an IR for the claimant's right index finger and thumb but did not include the right long finger which is part of the compensable injury. Accordingly, the ALJ correctly determined that Dr. M's certification cannot be adopted.

Dr. B, the RME doctor, examined the claimant and certified on May 9, 2017, that the claimant reached MMI on November 18, 2016, with an 18% IR derived from abnormal motion of the right thumb, index and middle fingers. Dr. B noted in his narrative report that over half of the claimant's impairment can be attributed to his non-compliant behavior. Thereafter, on June 12, 2017, Dr. B submitted an addendum together with an amended DWC-69 in which he "factors the non-compliance of the claimant into the final impairment. . . ." Dr. B assigned an IR of 9%, reduced from the 18% originally derived from the claimant's ROM testing. The ALJ states that Dr. B rated the compensable injury and provided a reasonable explanation for the date of MMI that

he selected, and notes that Dr. B indicated he "supplied a DWC-69 which factors the non-compliance of the claimant into a final impairment, or 9% whole person." The ALJ incorrectly adopted Dr. B's amended certification that the claimant reached MMI on November 18, 2016, with an IR reduced from 18% to 9%.

The methodology used by Dr. B in adjusting the numerical impairment assigned based upon a failure of the claimant to comply with prescribed treatment for the compensable injury is not provided for in the law or the AMA Guides. Accordingly, Dr. B improperly factored the claimant's non-compliance into the 18% IR determined from ROM testing by reducing the IR to 9%. Dr. B's assignment of a 9% IR is not based upon the claimant's condition as of the MMI date as required by Rule 130.1(c)(3) but rather is based upon what Dr. B believes the claimant's condition would have been had he completed his prescribed treatment. For such reason, the ALJ erred in adopting the 9% IR assigned by Dr. B. We accordingly reverse the ALJ's determination that the claimant reached MMI on November 18, 2016, with a 9% IR.

As mentioned previously, Dr. B initially certified that the claimant reached MMI on November 18, 2016, with an 18% IR. Dr. B stated in his report that he certified MMI on the date the claimant was discharged from occupational therapy. Dr. B further stated that he assessed impairment based upon the ROM measurements recorded by the claimant's occupational therapist on the date of MMI. We note from Dr. B's report, however, that he reviewed no occupational therapy records which were dated November 18, 2016, or pertained to treatment on that date. We note further that the claimant was not discharged from occupational therapy on November 18, 2016, as stated by Dr. B, but rather on November 28, 2016. Under the facts of this case, we cannot adopt Dr. B's certification of MMI on November 18, 2016, and assignment of 18% IR.

There is no other certification in evidence. We accordingly reverse the ALJ's determination that the claimant reached MMI on November 18, 2016, with a 9% IR and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), extends to a crush injury of the right hand, a displaced fracture of the distal phalanx of the right thumb, and right index and right long finger flexor muscle lacerations and mechanical complication of muscle and tendon graft. The ALJ is to request that the designated doctor give an opinion on whether the claimant has reached MMI and, if so, to rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is to reconsider the evidence on MMI/IR, including the designated doctor's certification, and make a determination concerning MMI/IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge